

FILED

DEC 12 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER) Nos. 03-2107, 04-1409
OF THE STATE BAR OF ARIZONA,)

FREDERICK C. HICKLE,
Bar No. 003552

RESPONDENT.)

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

A Complaint was filed on May 31, 2005. Respondent filed an Answer on August 1, 2005. A settlement conference was held on September 8, 2005, at which time the parties were able to reach an agreement. A Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent were filed on October 18, 2005. An Amended Tender of Admissions and Agreement for Discipline by Consent (Amended Tender) and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent (Amended Joint Memo) were filed on October 27, 2005. A telephonic hearing on the Amended Tender and Amended Joint Memo was held on October 26, 2005.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COUNT ONE (File No. 03-2107)

2. Respondent is, and at all relevant times was, the attorney of record for defendants Ronald Albert DeSantis and Shirleen DeSantis (hereinafter “DeSantis”), in *Brett Bennett, et al, v. A Touch of Sonora, et al*, Maricopa County Superior Court, CV2001-014689.

4. At the conclusion of the telephonic oral argument, the Court denied co-defendant's "Motion to Continue Trial" and confirmed the previously scheduled firm trial date of September 16, 2003, at 9:30 a.m.

6. As of September 16, 2003, Respondent had not withdrawn as

1 attorney of record, made a motion to continue the trial, or provided any written
2 explanation to the Court regarding his absence from the scheduled trial date.
3
4 However, Respondent believed that he had reached a settlement with Plaintiffs
5 such that the trial would not proceed against DeSantis but would only proceed as
6 to the other defendants.

7
8 7. In a minute entry dated September 16, 2003 (filed September 18,
9 2003), the Court set an order to show cause hearing and ordered Respondent to
10 appear on September 22, 2003, at 1:30, to address Respondent's failure to appear
11 for the trial. Respondent did not timely process his mail and thus Respondent
12 was not aware of the minute entry order setting the order to show cause hearing
13 until the time for hearing had passed.
14

15 8. On September 22, 2003, Respondent failed to appear at the time set
16 for hearing on the Court's order to show cause.
17

18 9. Respondent did not contact the Court either in writing or by
19 telephone in advance of the September 22, 2003 hearing.

20 10. In a minute entry dated September 22, 2003 (filed September 24,
21 2003), the Court sanctioned Respondent for his failure to appear at trial. The
22 Court further ordered that if the Court did not receive a satisfactory explanation
23 for the Respondent's absence from the order to show cause hearing, the Court
24 would reconsider the Plaintiff's motion to strike DeSantis' answer.
25

1 11. By failing to appear at the September 16, 2003 trial and the
2 September 22, 2003 order to show cause hearing, Respondent engaged in conduct
3 prejudicial to the administration of justice in violation of ER 8.4(d).
4

5 **COUNT TWO (File No. 04-1409)**
6

7 12. As a result of Respondent's failure to appear at the September 16,
8 2003, trial, the Court ordered a bifurcation of the trial. The trial did not proceed
9 as to Defendants DeSantis, but only proceeded as to the other parties.

10 13. As a result of Respondent's failure to appear at the September 22,
11 2003 order to show cause hearing, the Court ordered that Respondent would bear
12 all attorneys' fees and costs should a second trial as to the bifurcated case against
13 DeSantis be necessary.
14

15 14. On December 22, 2003, the Court ordered Respondent to pay, within
16 ten (10) days, \$7,500.00 to the Clerk of the Court as a deposit to cover attorneys'
17 fees and costs in the bifurcated trial.
18

19 15. Respondent failed to pay the \$7,500.00 deposit to the clerk of the
20 court within ten (10) days of the December 22, 2003, order.
21

22 16. On February 23, 2003, the Court found Respondent in contempt for
23
24
25

1 his violation of the December 22, 2003, order to pay the \$7,500.00 deposit¹ to the
2 clerk of the court.

3
4 17. On February 23, 2004, the Court further ordered Respondent to pay a
5 sanction of \$500.00 within ten (10) days for his failure to appear at the September
6 22, 2003 order to show cause hearing.

7
8 18. Respondent failed to pay the \$500.00 sanction within ten (10) days
9 of the February 23, 2004, order.

10 19. In a minute entry dated May 24, 2004 (filed May 26, 2004), the
11 Court ordered Respondent to file certain papers on or before July 23, 2004, to
12 address Respondent's failure to pay the \$500.00 sanction.

13
14 20. Respondent failed to file said papers regarding the \$500.00 sanction
15 as ordered on or before July 23, 2004.

16 21. In a minute entry dated July 27, 2004 (filed July 30, 2004), the Court
17 ordered Respondent to appear at an order to show cause hearing regarding his
18 failure to file the explanatory papers regarding the \$500.00 sanction. The order to
19 show cause hearing was set for 8:45 a.m. on August 9, 2004.

20
21 22. On August 9, 2004, Respondent failed to appear at the time
22 scheduled for the order to show cause hearing.
23

24 ¹ The issue of the \$7,500.00 deposit was later rendered moot with the entry of a judgment
25 against DeSantis. The \$7,500.00 deposit was intended to secure Plaintiff's attorneys' fees in
the event the case went to trial on the bifurcated issue. The final judgment was secured without
the necessity of such a trial.

1 23. In a minute entry dated August 9, 2004 (filed August 11, 2004), the
2 Court found Respondent in contempt of Court and ordered Respondent to pay a
3 \$300.00 sanction in addition to the \$500.00 sanction that had previously been
4 imposed. Respondent timely paid the total of \$800.00 in accordance with the
5 August 9, 2004 minute entry order.
6

7 24. By failing timely to deposit \$7,500.00 with the clerk of the court,
8 and failing timely to pay the \$500.00 sanction, failing to file papers on or before
9 July 23, 2004, and failing to appear at the Order to Show Cause hearing on
10 August 9, 2004, Respondent knowingly disobeyed obligations under the rules of a
11 tribunal in violation of ER 3.4(c).
12
13

14 **CONDITIONAL ADMISSIONS**

15 Respondent conditionally admits that his conduct, as set forth above,
16 violated Rule 42, Ariz. R. S. Ct., specifically ER 8.4(d) and ER 3.4(c).
17

18 **CONDITIONAL DISMISSALS**

19 The State Bar conditionally agrees, as to Count One, to dismiss the
20 allegations of violations of ER 3.2, ER 1.2, and ER 1.3, for the reason that the
21 Respondent's conduct did not clearly harm the interests of his clients and in
22 consideration of this agreement. The State Bar further conditionally agrees, as to
23 Count One, to dismiss the allegations of violations of ER 3.4(c), and Rule 53(c),
24 for the reason that the State Bar conditionally accepts Respondent's assertion that
25

1 he acted with a negligent state of mind rather than a knowing or willful state of
2 mind.

3
4 The State Bar conditionally agrees, as to Count Two, to dismiss the
5 allegations of violations of Rule 53(c) and ER 8.4(d), for the reason that
6 Respondent is being sanctioned for the same conduct pursuant to this Amended
7 Tender. An additional sanction for the same conduct is not necessary to further
8 the interests of justice in this case.
9

10 ABA STANDARDS

11 The ABA *Standards* list the following factors to consider in imposing the
12 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
13 actual or potential injury caused by the lawyer's misconduct, and (4) the
14 existence of aggravating or mitigating circumstances. ABA *Standard* 3.0.
15

16 The parties indicated that *Standard* 6.0 is the most applicable in this matter.
17 A review of ABA *Standard* 6.2 (Violations of Duties Owed to the Legal System)
18 indicates that suspension is the presumptive sanction for Respondent's
19 misconduct. *Standard* 6.22 (Abuse of the Legal Process) specifically provides:
20

21 Suspension is appropriate when a lawyer knowingly violates
22 a court order or rule, and there is injury or potential injury to
23 a client or a party, or interference or potential interference
24 with a legal proceeding.

25 1. The Duty Violated.

1 Respondent violated his duty to the legal system by repeatedly failing to
2 observe the rules governing the obligations of attorneys to a tribunal, and by
3 engaging in conduct prejudicial to the administration of justice. "Lawyers are
4 officers of the court, and the public expects lawyers to abide by the legal rules of
5 substance and procedure which affect the administration of justice." *Standard*
6 6.0, Introduction. Respondent admits that his conduct, taken as a whole, violated
7 his duty to the legal system.
8
9

10 2. The Lawyer's Mental State

11 The parties conditionally agree that Respondent was negligent in failing to
12 comply with a court order or rule by failing to appear at trial and failing to appear
13 at the first order to show cause hearing, and that Respondent negligently engaged
14 in conduct prejudicial to the administration of justice. At the time of the trial,
15 Respondent believed that he had reached a settlement with the plaintiffs, and that
16 plaintiffs would not be proceeding to trial against Respondent's clients.
17 Respondent was out of town when the trial commenced and the plaintiffs declared
18 there was no settlement. Respondent was also out of town when the minute entry
19 order setting the order to show cause hearing was issued. Respondent did not
20 timely process his mail when he returned from out of town, and thus Respondent
21 was not aware of the order to show cause hearing until the time for hearing had
22 passed.
23
24
25

1 The parties further agree that Respondent knowingly failed to comply with
2 a court order or rule by failing to lodge funds with the clerk of the court as
3 ordered, failing to pay a sanction, failing to file explanatory papers as ordered and
4 failing to appear at the second order to show cause hearing. Respondent knew of
5 these orders but did not comply. If the matter went to hearing, the State Bar
6 would argue that Respondent knew or should have known that his actions were
7 inadequate under the relevant rules or orders. The parties agree that Respondent
8 had a knowing state of mind in relation to the aforementioned failures to respond
9 timely and completely to the tribunal.
10
11

12 3. The Potential Injury Caused by Respondent's Conduct.
13

14 The parties conditionally agree that the clients did not suffer any actual harm
15 due to Respondent's rule violations. However, Respondent's failure to comply
16 with the rules governing his actions to a tribunal exposed his client and others to
17 potential injury by delaying litigation and interfering with a legal proceeding.
18

19 After determining the presumptive sanction, it is appropriate to evaluate
20 aggravating and mitigating factors enumerated in the *Standards* that would justify
21 an increase or decrease in the presumptive sanction. See *In re Scholl*, 200 Ariz.
22 222, 225-26, 25 P.3d 710, 713-14 (2001); *In re Savoy*, 181 Ariz. 368, 371, 891
23 P.2d 236, 239 (1995).
24
25

1 **AGGRAVATING AND MITIGATING FACTORS**

2 This Hearing Officer then considered aggravating and mitigating factors in
3 this case, pursuant to *Standards* 9.22 and 9.32, respectively.
4

5 This Hearing Officer agrees with the parties that there are two applicable
6 aggravating factors in this matter:

7 (c) pattern of misconduct; and,

8 (i) substantial experience in the practice of law.²
9

10 This Hearing Officer agrees with the parties that four factors are present in
11 mitigation:

12 (b) absence of a dishonest or selfish motive;

13 (k) imposition of other penalties or sanctions;³
14

15 (l) remorse; and

16 (m) remoteness of prior offenses.
17

18 In addition to the four mitigating factors agreed to by the parties, the
19 Hearing Officer finds that mitigating factor 9.32(e) – full and free disclosure to
20 the disciplinary board and cooperative attitude toward the proceedings, is also
21 present in this case.
22
23

24 _____
25 ² Respondent was admitted in 1973.

³ The court sanctioned Respondent in the total amount of \$800.00. This amount was paid after the court's second referral to the State Bar.

PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra*, 208 Ariz. at 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* 208 Ariz. at 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The most serious instance of misconduct in this case involves Respondent's failure to be aware of, familiarize himself with, and comply with the rules governing the obligations under a tribunal. Respondent repeatedly failed to obey the court's orders. The following cases are instructive concerning these types of misconduct.

In *In re Arrick*, 161 Ariz. 16, 775 P.2d 1080 (1989), the lawyer received a six-month suspension for failing to comply with a court order directing him to reimburse overpayments of attorney's fees to a probate client, among other violations. While particulars of the court order are different, the case is generally similar. The lawyer claimed he simply interpreted the court order inaccurately, but the Supreme Court found the order crystal clear saying "We strongly disapprove of respondent's conduct. An attorney must set an example for the

1 general public that obedience to a court order is not a matter of personal
2 convenience and cannot be ignored or disregarded without serious
3 consequences.” *Id.* 161 Ariz. at 20, 775 P.2d at 1084.
4

5 The Commission found two aggravating factors (vulnerability of client and
6 substantial experience in the law), and four mitigating factors (absence of prior
7 discipline; acknowledgment of conduct; cooperation with discipline procedure;
8 and remorse).
9

10 In *In re Bingham*, SB-02-0040-D (2002), the lawyer was suspended for six
11 months and one day for failing, as a court-appointed arbitrator, to set or conduct a
12 hearing by dates set by the court. The lawyer also failed to attend the OSC
13 hearing on his conduct. The Commission found two factors in aggravation (bad-
14 faith obstruction of the disciplinary process and substantial experience in the
15 practice of law), and one factor in mitigation (absence of a prior disciplinary
16 record).
17
18

19 In *In re Merchant*, 00-0057-D (2000), the lawyer was suspended for six
20 months and one day for failing to perform as a court-appointed arbitrator, failing
21 to appear at an OSC hearing and other offenses. In addition to lawyer’s
22 misconduct, deemed admitted by default, the lawyer failed to respond to the State
23 Bar’s inquiries. The Commission found two factors in aggravation (multiple
24 offenses and bad faith obstruction of the disciplinary process), and two factors in
25

1 mitigation (absence of a prior disciplinary record and the imposition of other fines
2 or penalties).

3
4 In *In re Davis*, SB-04-0033-D (2004), the lawyer failed to serve as an
5 arbitrator as ordered, then failed to appear at a show cause hearing scheduled by
6 the court. When a second show cause hearing was scheduled, the lawyer
7 appeared, but failed to provide an explanation for her failure to comply with the
8 court's order regarding the arbitration and failure to appear at the show cause
9 hearing. In that matter, unlike the instant case, the lawyer failed to respond to the
10 inquiry of the State Bar. The hearing officer considered *Standards* 6.22 and 7.2.
11 Although the presumptive sanction was suspension, the sanction imposed was
12 censure based upon the **substantial** mitigation present. In *Davis*, there was a lack
13 of a selfish or dishonest motive; personal and emotional problems due to deaths
14 of two people close to her and resulting depression; imposition of other penalty
15 by the court that the lawyer had complied with it; and remorse on the lawyer's
16 part. Davis had received an informal reprimand 6 years prior. Respondent was
17 informally reprimanded in 1996 and 1997 in this case.
18
19
20

21 In the cases cited above, suspension was the most common sanction. The
22 lengthier suspensions of six months or six months and one day were imposed in
23 cases in which the responding lawyer failed to cooperate with the State Bar or had
24 a vulnerable client. Those aggravating circumstances are not present in the
25

1 instant case. The lesser sanction of censure was imposed in one case in which the
2 lawyer presented substantial mitigation arising out of emotional problems from
3 the deaths of two people close to her. Such substantial mitigation is not present in
4 this case.
5

6 Considering the totality of the circumstances, the Hearing Officer finds that
7 Respondent's conduct warrants a lesser sanction than those sanctions imposed in
8 *Arrick, Bingham, and Merchant*. Respondent repeatedly failed to comply with
9 court orders and caused repeated interference with a legal proceeding. However,
10 Respondent did not cause actual harm to his client, obstruct the discipline
11 process, or otherwise aggravate his conduct as did the lawyers in the
12 aforementioned cases. Indeed, Respondent's client was apparently judgment
13 proof and did not care what happened to him, and had made it clear that he would
14 stipulate to a judgment against him. (R.T., 10/26/05, p.10). In light of the
15 mitigation present, the recommended sanction of a four-month suspension with
16 one year of probation and LOMAP is proportional and within the range of
17 discipline imposed in cases having mitigation factors similar to those present
18 here. Based on the mitigation and the totality of the circumstances, it **does not**
19 appear that formal reinstatement proceedings, pursuant to Rule 72, which requires
20 proof of rehabilitation, compliance with all applicable discipline orders and rules,
21 and fitness to practice and competence is necessary in this case. In the cases
22
23
24
25

1 cited above, where the lawyers defaulted and did not cooperate with the
2 disciplinary proceedings, there was no information available for the
3 Commission in reviewing the sanctions. There was no evidence regarding the
4 nature of the problem and consequently what type of rehabilitation would be
5 appropriate. Under those circumstances, requiring reinstatement is appropriate.
6 However, in this case, imposing probation with the suspension will address any
7 law office management issues that may have contributed to the conduct here. The
8 sanction adequately protects the public and the administration of justice.
9

11 The Supreme Court "has long held that 'the objective of disciplinary
12 proceedings is to protect the public, the profession and the administration of
13 justice and not to punish the offender.'" *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d
14 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78
15 (1966)). The Hearing Officer finds that the sanctions proposed here are
16 consistent with these principles.
17

18 RECOMMENDATION

19
20 The purpose of lawyer discipline is not to punish the lawyer, but to protect
21 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
22 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
23 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
24 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
25

1 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
2 (1994).

3
4 In imposing discipline, it is appropriate to consider the facts of each case,
5 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
6 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
7 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
8

9 Upon consideration of the facts, application of the *Standards*, including
10 aggravating and mitigating factors, and a proportionality analysis, this Hearing
11 Officer recommends acceptance of the Tender of Admissions and Agreement for
12 Discipline by Consent and the Joint Memorandum in Support of Agreement for
13 Discipline by Consent which provides for the following:
14

15 1. Respondent shall be suspended for a period of four months.

16 2. Upon reinstatement, Respondent will be placed on probation for a
17 period of one year effective upon the signing of the probation contract. The State
18 Bar will notify the Disciplinary Clerk of the exact date of commencement of
19 probation. The term of probation is as follows:
20

21 a. Respondent shall, within 30 days of the start of the probation period,
22 contact the director of the State Bar's Law Office Management Assistance
23 Program (LOMAP). Respondent shall enter into a probation contract that will be
24 effective for a period of one year from the date Respondent signs the probation
25


1 contract. Respondent shall comply with all recommendations of the LOMAP
2 director or her designee.

3
4 b. Respondent shall pay all probation costs incurred by the State Bar,
5 including the assessment by LOMAP and applicable monitoring..

6 c. In the event that Respondent fails to comply with any of the
7 foregoing conditions, and the State Bar receives information that he is not in
8 compliance, bar counsel shall file with the Hearing Officer a Notice of Non-
9 Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall
10 conduct a hearing within thirty days after receipt of said notice, to determine
11 whether the terms of probation have been violated and if an additional sanction
12 should be imposed. In the event there is an allegation that any of these terms have
13 been violated, the burden of proof shall be on the State Bar of Arizona to prove non-
14 compliance by clear and convincing evidence.
15
16

17
18 3. Respondent shall pay the costs and expenses incurred in this
19 disciplinary proceeding.

20 DATED this 12th day of December, 2005.

21
22 
23 Pamela M. Katzenberg
24 Hearing Officer 7T

25 Original filed with the Disciplinary Clerk
this 12th day of December, 2005.

1
2 Copy of the foregoing was mailed
3 this 12th day of December 2005, to:

4 Thomas A. Zlaket
5 Respondent's Counsel
6 310 South Williams Blvd., Suite 170
7 Tucson, AZ 85711-4446

8 Ariel I. Worth
9 Bar Counsel
10 State Bar of Arizona
11 4201 North 24th Street, Suite 200
12 Phoenix, AZ 85016-6288

13
14
15
16
17
18
19
20
21
22
23
24
25
by: P. Williams